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The Corporate Capture of the Federal Courts

Senator Elizabeth Warren

Thank you President Lyons, Dean Broderick, and Michael Rauh, for those very kind introductions. A special thanks to Wade Henderson. Wade and I have been in the trenches fighting together on consumer protection issues for many, many years. We started as children. And thank you to everyone at UDC for welcoming me today. It is a great pleasure to be here and a great honor to give a lecture named after Joe Rauh. Throughout his career, Joe fought to level the playing field for the underdogs in our society. Whether it was civil rights or fair housing, the labor movement or political advocacy, Joe was on the side of the little guy, trying to make the country a little more fair and a little more just.

This is an appropriate day to talk about Joe's legacy—because we are now in the second day of a completely unnecessary and completely avoidable government shutdown that is hurting regular folks around this country. Nearly a million federal employees are sitting at home for no reason. Life-saving medical research has been halted. Veterans benefits are at risk. Food safety inspections are being stopped. Basic nutrition services for pregnant women and new moms is about to be disrupted. Small businesses aren't able to secure federal loan guarantees. All of this, and more, because Republicans in the House of Representatives have refused to keep the doors open and the lights on across the entire government unless the President agrees to gut the Affordable Care Act.

The Senate has rejected these threats—and it will continue to reject these threats. The ACA is the law of the land. Millions of people are already trying to log on to ACA health care marketplaces around the country—people who need health care coverage, people who need insurance policies that don't disappear just when they are sickest. Women are finally getting insurance coverage for birth control. The law is here to stay, and it will stay. And the time has come for those legislators who cannot cope with the reality of our democracy to get out of the way so that those of us in BOTH parties who understand that the American people sent us to Washington to work for them can get back to working on solving the real problems faced by the American people.

Joe Rauh's lifelong commitment to fighting back on behalf of the little guy and working to solve these problems is a model for us today. On most of the hotly debated issues of law and policy, powerful interests are organizing themselves to put serious pressure on Congress and the courts to strip away some of the most important rights and reforms that we have fought so fiercely to win.

Here in Washington, power is not balanced. Instead, power is becoming more concentrated on one side. There are well-financed corporate interests lined up to fight for their own privileges and to resist any change that would limit corporate excesses. I saw one example of this up close and personal following the 2008 financial crisis when I fought against the biggest banks for stronger financial regulation, but there are many more.

In our democracy, when we write our laws, reasoned debate, public opinion, and political accountability are all factors that can thwart the efforts of big corporate interests. But even if big business loses the fight in Congress—and yes, it happens! Think of the NLRB, the EPA, the Consumer Financial Protection Bureau and now, the Affordable Care Act!—even in those cases, well-financed corporate interests know that they can turn defeat into victory if they can get a favorable court decision. If they can rig the courts, a friendly judicial system will give them a second bite at whatever they want.

It is because of this that there is an intense fight going on, right now, over what our federal courts will look like. It is a fight over whether those courts will remain a neutral forum, faithfully interpreting the law and dispensing fair and impartial justice—or whether we will see the corporate capture of the federal courts, with the courts transformed into one more rigged game. And right now, we are losing that fight.

The reasons are many. Consider the composition of the federal bench. Look closely and you will see a striking lack of professional diversity among the lawyers who currently serve as federal judges.

According to a study published by the American Constitution Society, as of 2008, the federal appellate bench was "dominated by judges whose previous professional experience is generally corporate or prosecutorial."[1] The study examined the biographies of 162 judges listed in the Almanac of the Federal Judiciary. It found that 85% of the judges had worked in private practice, and also noted that it was "clear from the judges' biographies that a sizable number of them worked for large, well-known firms that tend to represent corporations."[2]

Since taking office, President Obama has been responsible for some notable exceptions to this trend. District Court Judge Edward Chen worked for many years as a staff attorney at the ACLU.[3] Generally, however, even the president's appointments have been in line with prior statistics.

I want to be clear—there are some really, really talented judges who come from the private sector. I myself have done some work for private clients. And it is of course true that the personal views of an attorney often diverge from those of his or her clients.

But I think diversity of experience matters. At his induction ceremony, Judge Chen was quoted as saying that he never considered withdrawing his name from consideration because, as he explained, "I believe that someone should not be disqualified from the bench simply because they once represented the voiceless and unpopular, rather than the wealthy and the powerful."[4] Judge Chen is absolutely right.

Today, we are at a unique moment where we have a chance to add some diversity of legal experience to the D.C. Circuit, which hears most appeals of agency decisions and has often been called the second most important federal court in the land. Some of the most consequential decisions of our time—the decisions about whether Wall Street Reform will have real bite or whether it'll be toothless—are only now bubbling up through the D.C. Circuit.

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[1] Ellen Eardley & Cyrus Mehri, *Defending Twentieth Century Equal Employment Reforms in the Twenty-First Century,* AM. CONST. SOC. FOR L. & POL'Y, 10 (2013), *available at* https://www.acslaw.org/sites/default/files/Eardley_and_Mehri_-_Defending_Equal_Employment_Reforms.pdf.

[2] *Id.* at 11 n.42.

[3] *See* U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, *District Judge Edward M. Chen,* http://www.cand.uscourts.gov/emc (last visited June 11, 2013).

[4] YOUTUBE, *Judge Edward M. Chen Confirmation Ceremony*, http://www.youtube.com/watch?v=UNqriAtwjPU (last visited June 11, 2013).

Some have suggested that the D.C. Circuit doesn't need any more judges, even though there are currently three vacancies on that court. The next time you hear someone make that claim, you might remind them that the President with the most appointees sitting on the D.C. Circuit right now is Ronald Reagan.[5] And it's been twenty-five years since his last appointment to that court.

President Obama has nominated three outstanding nominees to fill the vacancies on this court. One of the nominees, Patricia Millett, has argued a whopping 32 cases before the Supreme Court. The second nominee, District Court Judge Robert Wilkins, spent twelve years working for the Public Defender Service of the District of Columbia and eight years at a major law firm.

The third nominee—Professor Nina Pillard—has been the subject of heavy partisan attacks. Professor Pillard is among the most accomplished appellate advocates of her generation. She has spent years working for the Justice Department and has argued nine cases before the Supreme Court. She also spent five years working for the NAACP and has served as a professor at Georgetown since 1997. Despite the fact that Professor Pillard has not spent years at a large corporate defense firm, there can be no question that she is highly qualified to serve.

These three individuals represent the best of the legal profession and nominees like Judge Wilkins and Professor Pillard would bring significant professional diversity to the D.C. Circuit. All three nominees deserve up-or-down confirmation votes as soon as possible.

Beyond the District Courts and the Appeals Courts, another important reason why we are at serious risk of losing the neutrality of our judicial system is the increasingly brazen and ideological pro-corporate tilt of the Supreme Court. Three well-respected legal scholars—including Judge Richard Posner of the Seventh Circuit, a widely respected and very conservative Reagan appointee—recently examined almost 20,000 Supreme Court cases from the last 65 years. The scholars used multivariate regression analysis to determine how often each justice voted in favor of corporate interests during that time. Judge Posner and his colleagues concluded that the five conservative justices currently sitting on the Supreme Court are in the top ten most pro-corporate justices in a half-century—and Justices Alito and Roberts are numbers one and two.[6]

And take a look at the win rate of the Chamber of Commerce. The Constitutional Accountability Center has shown how the Chamber moved from a 43% win-rate during the last five terms of the Burger Court, to a 56% win-rate under the very conservative Rehnquist Court, to a 70% win rate with the Roberts Court.[7] Follow this pro-corporate trend to its logical conclusion and sooner or later you'll end up with a Supreme Court that functions as a wholly owned subsidiary of big business.

The consequences of this pro-corporate shift are staggering. The Affordable Care Act came within an inch of being invalidated by this Supreme Court. *Citizens United* unleashed an avalanche of secret corporate money into our political system. The Voting Rights Act has been gutted.

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[5] *See* UNITED STATES COURT OF APPEALS: DISTRICT OF COLUMBIA CIRCUIT, *About the Court: Judges*, http://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges (last visited June 11, 2013).

[6] Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1450-51 (2013), *available at* http://www.minnesotalawreview.org/wp-content/uploads/2013/04/EpsteinLanderPosner_MLR.pdf.

[7] Doug Kendall & Tom Donnelly, *Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court - An Early Report for 2012-2013*, CONST. ACCOUNTABILITY CTR., (2013), *available at* http://theusconstitution.org/text-history/1966/not-so-risky-business-chamber-commerces-quiet-success-roberts-court-early-report.

And other less prominent cases are just as damaging. In the Lily Ledbetter case, the Supreme Court chose to protect employers over employees, ignoring the basic principle of equal pay for equal work. The Supreme Court rewrote our established understanding of the standards for filing lawsuits in the *Iqbal* and *Twombly* cases, making it easier for rich corporations to beat poorer underdogs. The Court looks for every opportunity to undermine class actions—which leave big corporations free to roll over millions of people.

Whether it's the District Courts, the Appeals Courts, or the Supreme Court, we don't need judges who put a thumb on the scales of justice for either side. We just need judges who will be fair, judges who will be even-handed, and judges who have the experience to understand and consider all sides of an issue.

At every level of the judiciary, it's time for a new generation of impartial judges, judges whose life experience extends beyond big firms, federal prosecution, and white-collar defense. We need sustained pressure to get those judges in front of the Senate. Pressure—pressure on our President, pressure on Senators, pressure in the press. And if the judges don't get a vote, if they are blocked, if they can't get through—we need to change the filibuster rules so we can get them through. We need a new generation of judges on the bench—and we must prevent the corporate capture of the federal courts.

I don't kid myself. Change is hard. But we need to get back to the business of making government work for people—not for big corporations or special interests. The people in this room and the lawyers all across the country who are committed to public interest law and social justice are tough, resourceful, and creative. I believe in what we can do together. I believe in what we must do together.

Thank you for having me here today.